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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR HUGO TAPIA,

Defendant and Appellant.

G041646

(Super. Ct. No. 07ZF0008)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla M. Singer, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Hugo Tapia appeals from a judgment after a jury convicted him of premeditated and deliberate attempted murder, possessing a firearm within 1,000 feet of a school, and street terrorism, and found true various firearm and street terrorism enhancements. Tapia argues the trial court erroneously instructed the jury with CALCRIM No. 370, “Motive,” without informing the jury the instruction did not apply to the street terrorism enhancement. We disagree and affirm the judgment.

FACTS

Andres Garcia drove past Vicente Lopez’s house when he saw Lopez, in his black Ford Taurus, backing out his driveway. Garcia parked and approached Lopez’s car where he saw George Correa in the front passenger seat and Tapia in the back seat. Correa told Garcia they were going to smoke marijuana and “kick some guy’s ass.” Garcia assumed they were going to look for a “La Colonia” gang member because someone had shot at the house of a fellow “Devious Hoodlums” gang member and they were rival gangs. Garcia decided to join the men in their search.

Lopez spotted a potential target and exclaimed, “There he is.” Jason Correa (Jason), a La Colonia gang member, was standing in front of his school with three friends. Correa asked Jason where he was from, and Jason responded, “La Colonia.” Tapia took a gun from his sweatshirt, reached across Garcia, and shot at Jason through the open window. Lopez drove away and the men eventually went their separate ways.

Police officers later found Lopez’s car.¹ Clothing items recovered from near the car contained Tapia’s DNA. Ballistics evidence found in the car matched ballistics evidence found at the scene of the shooting. Tapia was extradited from Mexico and arrested.

¹ We affirmed Lopez’s convictions in our nonpublished opinion *People v. Lopez* (May 18, 2010, G041006).

An amended indictment charged Tapia with four counts of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))² (count 1-Jason Correa, count 2-Ervin Avalos, count 3-Marcos Buenrostro, count 4-Jose Contreras), possession of a firearm within 1,000 feet of a school (§ 626.9, subd. (b)) (count 5), and street terrorism (§ 186.22, subd. (a)) (count 6). The amended indictment alleged Tapia committed counts 1, 2, 3, 4, and 5 for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) With respect to counts 1, 2, 3, and 4, the amended indictment alleged he personally used a firearm (§ 12022.53, subd. (b)), and personally discharged a firearm (§ 12022.53, subd. (c)). Finally, the amended indictment alleged Tapia personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), with respect to count 1.

The prosecutor offered the testimony of a gang expert, Officer Juan Reveles. After detailing his background, training, and experience, Reveles testified concerning the culture and habits of criminal street gangs. He opined Devious Hoodlums is a criminal street gang, and one of its rivals is La Colonia. Based on his review of the case, he believed Tapia was an active participant of Devious Hoodlums at the time of the offense. He opined the type of conduct involved in this case benefitted and promoted a criminal street gang because it increased respect and furthered its reputation.

The jury convicted Tapia of counts 1, 5, and 6, and found true the firearm enhancements as to count 1, and the street terrorism enhancements with respect to counts 1 and 5. After denying Tapia's new trial motion, the trial court sentenced him to a total term of 42 years to life in prison.

²

All further statutory references are to the Penal Code.

DISCUSSION

Tapia argues the trial court erred by instructing the jury with CALCRIM No. 370, “Motive,” without specifying the instruction did not apply to the gang enhancement allegation. We disagree.³

CALCRIM No. 370 stated: “The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.”

People v. Fuentes (2009) 171 Cal.App.4th 1133 (*Fuentes*), is instructive. In *Fuentes, supra*, 171 Cal.App.4th at pages 1136 to 1137, an information charged defendant with murder, attempted murder, assault, street terrorism, and various other crimes involving the use of a firearm, and alleged gang enhancements pursuant to section 186.22, subdivision (b)(1). The trial court instructed the jury with CALCRIM No. 370, using the same language quoted above. (*Fuentes, supra*, 171 Cal.App.4th at p. 1139.) Defendant argued CALCRIM No. 370 contradicted the instruction for the gang enhancement allegations, which required the jury to determine whether the prosecution proved defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang, and that defendant *intended* to assist, further, or promote criminal conduct by gang members. (*Ibid.*)

The *Fuentes* court stated: “An intent to further criminal gang activity is no more a ‘motive’ in legal terms than is any other specific intent. We do not call a premeditated murderer’s intent to kill a ‘motive,’ though his action is motivated by a desire to cause the victim’s death. Combined, the instructions here told the jury the

³ We will address the merits of Tapia’s claim, the Attorney General’s forfeiture argument notwithstanding, because CALCRIM No. 370 affected his substantial rights. (§ 1259.)

prosecution must prove that [defendant] intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it. [Defendant] claims the intent to further criminal gang activity should be deemed a motive, but he cites no authority for this position. There was no error.” (*Fuentes, supra*, 171 Cal.App.4th at pp. 1139-1140.)

The *Fuentes* court also distinguished *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*), on which Tapia relies. The *Fuentes* court reasoned *Maurer* did not conflict with its conclusion because that case concerned section 647.6, a statute fixing punishment for committing acts or conduct “motivated” by an unnatural or abnormal sexual interest in the victim. In distinguishing *Maurer*, the *Fuentes* court explained, “Since this offense includes a ‘motivation’ as one of its elements, a jury naturally would be confused by an instruction saying the prosecution need not prove the defendant’s motive.” (*Fuentes, supra*, 171 Cal.App.4th at p. 1140.)

Here, the trial court did not err in instructing the jury the prosecutor need not prove motive while also instructing the jury the prosecutor must prove Tapia had the specific intent to assist, promote, or further criminal conduct by Devious Hoodlum gang members. Motive, intent, and malice are not synonyms—they are separate and disparate mental states. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) The court properly instructed the jury concerning the intent the prosecutor was required to prove to establish the truth of the street terrorism enhancement. We presume jurors are intelligent people capable of understanding the instructions and applying them to the facts of the case. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Finally, CALCRIM No. 370 by its terms applies to “the crimes charged,” and not to gang enhancement allegations. We find the reasoning in *Fuentes* persuasive, and Tapia’s attempt to distinguish it unavailing. Therefore, it is not reasonably likely the jury misunderstood or misapplied CALCRIM No. 370.

DISPOSITION

The judgment is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.